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Fray W. Zemp, Bill Zemp v. Vanfrank and Associates, Inc., Roger M. Van Frank : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

FRAY W. ZEMP and BILL ZEMP,

Plaintiffs and Respondents,

v.

VANFRANK & ASSOCIATES, INC., and ROGER M. VANFRANK,

Defendants and Appellants.

No. 14089

APPELLANTS' BRIEF

Appeal from Judgment and from Order of the Third District Court for Salt Lake County Denying Motion to Amend Findings and Judgment

Hon. G. Hal Taylor, Judge

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STATEMENT OF THE KIND OF CASE

This is an action to invalidate a contract with defendant architects to draw plans for a duplex, and for damages, including punitive damages; defendants counterclaimed to recover for their architectural services, to foreclose a mechanic's lien therefor, and to obtain damages for libel.

DISPOSITION IN LOWER COURT

The case was tried to the court, sitting without a jury. The court entered judgment in favor of plaintiffs, for the most part, and defendants appeal.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the judgment, an equitable review of the record by this court, and judgment in defendants' favor as a matter of equity and law.

STATEMENT OF FACTS

The claim of plaintiffs to nullify and cancel the contract, and the counterclaim of defendants to foreclose their mechanic's lien invoked the equitable jurisdiction of the court. It is submitted that, accordingly, this court should determine the facts as well as the law of this case. The entire record is presented for this purpose.

Plaintiffs, hereinafter referred to as the Zemps, contacted defendant corporation and Roger van Frank, who are a professional corporation and licensed architect, respectively, hereinafter referred to as van Frank. They requested van Frank to prepare for them architectural drawings for a duplex. The new building was to be situated upon a lot owned by Fray Zemp and her father, upon which lot Zemps already had two other duplexes. On June 6, 1973 the parties signed a Contract for Permit Drawings (Exh 1-P).

There is considerable greatly conflicting testimony about whether the drawings prepared by van Frank were for the kind of building Zemps said they wanted, and about other matters. To put it kindly, somebody was surely careless about the truth.

Zemps stated in their complaint, in their answers to interrogatories and sometimes on the witness stand (R 92, 102, 129, 131, 137) that there was no part of the plans and specifications that were what they had ordered or requested from van Frank. Bill Zemp testified that he did not read the answers to interrogatories before he signed them and that he would have signed them no matter what they said or didn't say (R 96). Zemps sometimes testified that they were not given any opportunity to request any

changes and that van Frank would not listen to any requests by them for changes (R 110, 116, 126-7). Zemps sometimes testified that they did request changes (R 91, 97-100, 105, 115, 130, 137-40, 331), that van Frank did discuss changes with them (R 97, 105, 123, 130, 325-6, 332-3) and that changes were made (R 130, 332) but that they did not like the plans (R 108-9) or the changes (R 324-334) or that changes were all right (R 130). In response to a question by the court, Bill Zemp said he did not complain to van Frank about the plans (R 101), but after his lawyer "put words in his face", with leading questions, he said he did complain about them (R 101-2).

Roger van Frank and his architectural assistant, Dennis Cecchini, testified that they tried to prepare drawings for the kind of building Zemps said they wanted (R 7-11, 16, 20, 26, 54-5, 64, 289-99, 312); that they started by talking with Zemps and by following a rough sketch in blue ink made by Bill Zemp (Exh 2-P, R 10-11, 65-6); that thereafter, pursuant to discussions with Zemps, they made changes in the location and style of stairways, windows, the roof, fireplaces, the building elevation and other things (R 65-71, 77, 169, 173-7, 293-303; Exhs 38-D, 43-D); that the original drawings were erased and redrawn and re-erased and redrawn as Zemps wanted changes, and that some of the erased lines show as "ghosts" on the drawings (Exhs 37-D thru 42-D, R 169, 288-95); that differences between the schematic drawings (Exhs 2-P, 33-D) the preliminary drawings (Exhs 19-D thru 24-D) and the final drawings (Exhs 37-D thru 42-D) also show changes made for the Zemps (R 60-1).

Roger van Frank and his employees testified that it was not until long

after the final drawings had been completed and delivered to Zemps that Zemps claimed they were not satisfactory as completed; that it was not until van Frank was requesting payment and had filed a mechanic's lien therefor (R 299); that van Frank charged $60 for changes that were ordered by Zemps (R 17, 23-7, 47), differing from the original instructions; that van Frank, without additional charge therefor (R 56-7) prepared specifications (Exh 18-D) containing details necessary for Zemps to obtain a building permit, which details otherwise might have appeared on the drawings themselves (R 56, 80); that the specifications were completed for delivery on July 20, 1973 (R 9, 23, 57-9) when Fray Zemp called at van Frank's office to discuss the matter and to request van Frank to put pressure for payment on her husband, directly, referring to personal problems between themselves (R 83-4).

On August 23, 1973 van Frank recorded a notice of mechanic's lien (Exh 5-P). This notice claimed an amount much more than the invoice to Zemps because when van Frank prepared the notice they believed they should claim a sum that would be the maximum of attorney's fees, delinquency charges, interest and costs that they might incur in a contested foreclosure proceeding or they would be barred from collecting such sums. However, at no time did defendant demand this higher amount from Zemps. On October 5, 1973 van Frank recorded its amended notice of lien (Exh 14-P), claiming the principal sum of $616.33, the original invoice amount.

On October 4, 1973 van Frank's lawyer received from Zemps' lawyer a letter (Exh 9-P and 34-D) which contained a cashier's check (Exh 8-P) in

the amount of $626.57. The letter stated that the money was tendered to release the lien but also stated that it was "in payment for the so-called building drawings, which are wholely unsatisfactory," and stated that Zemps subsequently would make demand "to comply with furnishing the plans that were ordered and not the misfit plans". The letter also stated:

> "The contract for permit drawings was signed by my client before any plans were made or drawn and it appears that the owner, under such circumstances, is stuck for the drawings regardless of how piss-poor they may appear or end up being. Besides having a blanket check for the initial amount of 15¢ per square foot, the architect under the supposed agreement is given a further blank check to charge for time taken by the owner to correct and direct the architect to accomplish that which he should do in the first place, and it appears under such circumstances, that the more stupid the architect is, the more he is entitled to charge therefor because he can charge time on correcting his own stupid mistakes."

On October 5, 1973 van Frank's lawyer, on instructions from van Frank, returned the check with his letter stating grounds for rejection of a conditional tender, not only because of unacceptable conditions but also because the tender did not include costs for cancellation of the lien and attorney's fees, as provided in the contract. Reference was made therein to a letter dated September 27, 1973 from van Frank's lawyer to Zemps' lawyer itemizing the amount claimed.

No payment or further tender of payment was made by Zemps and on November 21, 1973 they filed this action against van Frank in four counts, seeking to have the contract with van Frank declared null and void, as against public policy and for lack of consideration, and seeking punitive damages,

attorney's fees, and a statutory penalty of $20 per day, pursuant to U. C. A. 38-1-24, for van Frank's refusal and failure to release the lien(s). Van Frank responded with an answer and counterclaim in three counts, charging Zemps with libel, claiming payment for the architectural services and attorney's fees, per contract, and praying foreclosure of the mechanic's lien.

The case came on for trial in the District Court of Salt Lake County before the Honorable G. Hal Taylor, sitting without a jury. At the trial the following witnesses were called to testify for plaintiffs, Zemps: Roger van Frank, Bill Zemp and Fray Zemp, about matters involved in Zemps' claims against van Frank, generally; Gordon Connley, a Salt Lake County building inspector, Ronald Ivie, a Salt Lake County plans and specifications analyst in the Building and Zoning Department, and Alvin Mason, a Salt Lake City engineer, who prepared substitute plans for the duplex (R 74). These witnesses testified that some changes would be required in the van Frank drawings before they would comply with the County Building Code.

Van Frank called the following witnesses in connection with his defenses and counterclaims: Roger van Frank, Bill Zemp, Fray Zemp, Dennis Cecchini, who is a graduate in architecture employed by van Frank, Brigitta Gornik, who is an architectural draftsman for van Frank, Carol Merritt, who was van Frank's secretary during the period when the drawings and specifications were prepared, Mari Davis, who is the replacement secretary for Mrs. Merritt, and Cheryl Waldman, the secretary for van Frank's lawyer. In their work as secretaries, Mrs. Davis and Mrs. Waldman read the libelous letter referred to above.

Following the presentation of evidence and arguments of counsel, the court announced its decision into the record (R 339-347). Many months afterward, and before presenting proposed findings and decree to the court, Zemps through counsel renewed a motion to have Roger van Frank joined as an individual party defendant and to be held personally liable to plaintiffs. Upon a hearing thereof this motion was granted. Subsequently, said attorney presented to the court its findings of fact and conclusions of law and its decree, for entry. Thereupon, van Frank through counsel moved to amend them, which order was denied on April 3, 1975. Thereafter, notice of van Frank's appeal was timely served.

STATEMENT OF POINTS

1. The findings and conclusions and the decree do not comply with the decision announced by the court.
2. The decision of the court and the findings and conclusions and the decree are not supported by the evidence. The evidence clearly shows that:
   a. Defendants performed the contract and are entitled to be paid;
   b. The mechanic's lien was entitled to foreclosure;
   c. Defendants were libeled by plaintiffs.
3. The statutory penalty imposed upon defendants is against the law.

ARGUMENT

1. The findings and conclusions and the decree do not comply with the decision announced by the court.

If this court should feel that in equity the findings and conclusions and the decree are supported by the evidence (but see Point 2, below) it is clear that those documents, prepared by plaintiffs' attorney, varied in important particulars from the decision of the court, announced at the close of trial. Although the formal findings and decree do constitute the action of the court unless changed, two things are very proper to keep in mind in this connection. First, the decision announced by the court is the judge's own, direct findings and conclusions -- not the restatement thereof prepared later by an advocate. The advocate, even unconsciously, can hardly help but shade many things in favor of his client. We see this all the time, where the facts found have become more black or white in the formal findings. Secondly, the appellate court although indulging a reluctance to set aside findings, should properly know, particularly in an equity case, to what extent the findings were at first those of the judge, when the evidence was fresh in his mind, rather than the draftsmanship of the advocate, placed before the busy judge for his signature at a later time.

This is important in connection with the finding of the court that there was absolutely no evidence of wilful or malicious conduct on the part of defendants which would entitle plaintiffs to punitive or exemplary damages (see Point 3, below). Further, the court found that there was only one lien, which was amended to set forth the correct amount, and that it was properly filed (R 344). Further, the Zemps' tender of payment was both for the purpose of releasing the lien and also "in payment for the so-called building drawings" (Exh 9-P). Further, the findings do not show, contrary

to the stipulation of the parties, that the per-square-foot amount of defendants' invoice should have been the sum of $474.27 instead of the sum of $551.10. There are additional, perhaps less material, variations between the findings prepared by Zemps' lawyer and the decision announced by the court.

2. The decision of the court and the findings and conclusions and the decree are not supported by the evidence.

The first cause of action of Zemps' complaint prays that the architectural contract (Exh 1-P) be declared null and void and that the court grant them just and equitable relief. A suit to obtain the recission of a contract or the cancellation of an instrument is peculiarly one of equitable cognizance, even though as an incident to cancellation or recission the recovery of money also is sought. This should be borne in mind in dealing with questions of judicial recission or cancellation notwithstanding the fact that there is now in most states but one form of remedy for both legal and equitable causes of action. In applying the relief allowable, the courts still adhere to the distinctions commonly accepted between actions of law and suits in equity. 13 Am Jur 2d, Cancellation of Instruments, Sec 2.

Van Frank's counterclaim to foreclose the mechanic's lien also seeks a remedy that is uniquely equitable. Where the distinction between actions of law and suits in equity is maintained, proceedings to enforce mechanic's liens are regarded as suits in equity and are governed by the rules of chancery practice. 53 Am Jur 2d, Mechanics Liens, Sec 349. This court has held that an action to foreclose a mechanic's lien is an equity case. Langton

Lime & Cement Co. v. Peery, 48 Utah 112, 159 P. 49.

In equity cases, of course, the appeal to this court may be on questions of both law and fact. Utah Const., Art. VIII, Sec. 9. Petty v. Clark, 113 U 205, 192 P2d 589. We recognize that in applying this traditionally equitable review the appellate court will not disturb the trial judge's findings unless it appears that the evidence clearly preponderates against such findings. But as observed in Wiese v. Wiese, 24 U2d 236, 469 P2d 504:

> This is an equitable matter, and upon appeal the binding effect of the findings made by the trial court differs from that in a law matter. We may here review questions of both law and fact; and after making due allowance for the advantaged position of the trial judge to observe the demeanor of witnesses upon the stand, we may be persuaded that a finding is against the preponderance of the evidence to such an extent that we would be justified in disapproving it or even in making a finding of our own. (Cases cited.)

a. Defendants performed the contract and are entitled to be paid.

The record clearly shows substantial discrepancies in the testimony of the Zemps as contrasted with the testimony of Roger van Frank and his witnesses, as detailed above. The trial court so observed in rendering his decision and he appears to have rejected the conflicting testimony of both sides and to have emphasized unduly "the only uncontroverted evidence in the record" that Zemps wanted a plan for a duplex to be as large as possible and to "look like" the other duplexes (R 127, 136, 345 but see R 115). Or to "comply with" them (R 4, 115, 136)? Actually, Fray Zemp controverted even this because look-like is not the same as comply-with.

If there were no clearly obvious reasons to believe one witness over another, it would seem that the contradictory testimony might be at a stand-off. However, there is in the record the clear impeachment of Bill and Fray Zemp. Their testimony not only contradicts that of Roger van Frank and his employees, they each contradicted themselves in important matters. In determining the truth, an unbelievable witness does not tip the scales against a believable witness. How can we believe, as they stated, that there was not one part of the plans and specifications that were what they had ordered or requested from van Frank, that they were not given any opportunity to request any changes and that van Frank would not listen to any requests by them for changes? Particularly, how can we believe this when they also testified that they did request changes, that van Frank did discuss changes with them, and that changes were made. Also, it is significant that Bill Zemp's sworn answers to the van Frank interrogatories were not even read by him before he signed them, that he admitted in court that he did not know one question therein contained, and that he said he would have signed them when they were put before him no matter what they said or didn't say. The evidence is so contradictory it is apparent that more than mere mistake or faulty memory of witnesses is involved. The extreme position taken by Zemps, claiming total dissatisfaction with these carefully prepared drawings, and no opportunity to state their wishes, bespeaks wilfully false testimony. Note the repeated evasions by Fray Zemp in her testimony starting at R 116. We tell jurors that if they believe any witness has wilfully testified falsely as to any material matter they may disregard the entire

testimony of such witness, unless otherwise corroborated. Gittens v. Lundberg, 3 U2d 392, 284 P2d 1115. Contradictory evidence frequently must be considered in this way, not by simply disregarding all contradictions and only looking at whatever may be left.

On van Frank's side of it, if Zemps' claim is true, why are there any ghosts (incompletely erased lines) on the drawings at all? Why did Roger van Frank and Dennis Cecchini redraw anything? Did it make it easier for them to show a profit on this project by drawing anything twice? The ghosts are real evidence of a very persuasive nature. They are not someone's recollection long afterward, and hence more likely to be inaccurate. They show clearly that changes were made in the location and style of many things. It becomes clear in the evidence that the new duplex could not look just like the existing duplexes because to do so it could not contain the changes that the Zemps asked van Frank to make. For instance, how could a duplex with bay windows look like duplexes without them? It is clear that the Zemps sometimes disagreed between themselves and sometimes changed their minds (see R 99-100). This is not necessarily wrong but to deny it is wrong. Under these circumstances does a court of equity say to van Frank, as the trial court in effect said, "You get nothing for your efforts"? If we are to fault van Frank in this connection, it should be for trying to do too much to prepare a functional and attractive building, rather than for doing too little. It appears his office does not specialize in architectural boiler plate.

Much of Zemps' affirmative case was evidence that the van Frank drawings and specifications did not comply with the building code and could not be approved for construction. In particular, a great deal of emphasis was placed on the eight-inch or nine-inch foundation wall matter. However, after van Frank asked Zemps' witnesses to show such a requirement in the code (Exh 29-P) and after they said that they would locate it and bring it to court (R 148-9) they never did show such a building code requirement and they never did bring such a supplement or additional regulation to court. Why not? --because there was none. To the contrary, there was evidence that a one-inch overhang of the facing brick, and remember this is only brick veneer, may be and sometimes is approved. In any event, testimony was given by the County building inspector, Mr. Connley, that upon submission of drawings and a disapproval of an eight-inch foundation it would be a simple matter, without even redrawing anything, to specify a nine-inch thickness instead of eight-inch (R 144-5). Mr. Connley testified that when drawings are submitted and some things are found that necessitate changes it is common practice simply to write the changes upon the drawings in red ink, before a building permit issues (R 145). Van Frank testified that this would have been done readily, without any charge to the Zemps, if it appeared that it was an architect's error.

Another item in this connection is Zemps' assertion that the roof was not trussed properly in the drawings or specifications (R 153). Yet they also took the position that the truss diagram (R 300, Exh 43-D) for proper trussing, that van Frank attached to and made a part of the specifications (which was

the final portion of the project not completed until July 20th) were a non-essential part of van Frank's work (R 313 but see 152-5, 300). Again, variances in testimony between opposing witnesses is one thing, material variances in the testimony of witnesses on the same side is something else.

b. The mechanic's lien was entitled to foreclosure.

Although he ruled against van Frank, generally, the trial court nevertheless found that the mechanic's lien was sufficient, as amended, and was properly filed. His conclusion was that if van Frank was entitled to anything under the contract he would be entitled to foreclose unless there was a proper tender. The court found that there was a proper tender because Zemps offered more than van Frank was entitled to, if he was entitled to anything.

Was van Frank's rejection of Zemp's tender proper? The amount tendered did not include fees for cancellation of the lien or attorney's fees, as provided in the contract. See Einerson v. Central Lumber & Hardware Co., 14 U2d 278, 382 P2d 655. It might be noted that the amount of attorney's fees claimed was the amount provided by the Third District Court's schedule, which is stated to be acceptable without proof in default cases to charge a debtor with attorney's fees (where so obligated) and the amount that was claimed against Zemps is approximately one-third of the principal claimed. It may be felt that although attorney's fees are provided in the contract there is no need to pay them to discharge a mechanic's lien. Nevertheless, where the tender is not only to release the lien but also to pay the debt, here "in payment for the so-called building drawings" (Exh 34-D),

that would leave the creditor in the position of having to sue thereafter only to recover his contractual attorney's fees and almost certainly to be confronted with the defense that he had barred himself from any further claim by accepting the amount tendered. This would operate to nullify such contractual provisions. A mechanic's lien holder may recover attorney's fees from his obligor where the contract between them provides therefor. 57 C.J.S. Mechanics Liens, Sec 353.

If it be felt that van Frank was claiming more than he was entitled to, anyway, and hence had no right to reject the tender, we would have this result: that a lien claimant, though acting in good faith, will be at his peril if it subsequently develops that through any error, such as in computation, the amount claimed was incorrect. It has been held that such an error does not invalidate a lien, for the correct amount. 53 Am Jur 2d, Mechanics Liens, Sec. 234.

It should be noted in the instant case that although on first appearance it would appear to be a simple matter to determine the number of square feet covered by the drawings, in practical effect there are factors, such as roof overhangs, "exterior construction", bay-windows, etc. which are not always treated in the same way for such purposes. More than an hour of time in court and during the lunch recess, and eleven pages of the record, were taken up with this matter (R 28-38). Van Frank's invoice claimed payment for 3674 square feet, and in the answers to van Frank's interrogatories Zemps claimed that 3020 square feet was the proper area. Its ultimate resolution, by stipulation, produced an area of 3161 square feet,

neither party having been very accurate at first (R 38).

c. Defendants were libeled by plaintiffs.

The letter dated October 2, 1973 (Exh 34-D) from Zemps' lawyer to van Franks' lawyer, which accompanied the tendered check, so inflamed Roger van Frank and so upset his secretary and other personnel in his office that an early, practical adjustment of this matter became impossible.

The trial court raised the question whether it relates personally to Mr. van Frank. How can it be interpreted any other way? It refers to this contract and in the same sentence, quoted above, says that the architect, obviously this architect, is given a blank check; that under such circumstances the more stupid the architect is the more he can charge to correct his own stupid mistakes. This not only imputes stupidity, it imputes intentional mischarging. An architect who prepares piss-poor drawings, drawings that are only so-called architectural plans and are misfit, who makes stupid mistakes, and who demands a blank check for the purpose of mischarging his clients, does have his reputation impeached and is exposed to contempt and ridicule. Beyond that, the negative effect upon his professional business is obvious.

Was the letter published? The trial court appears to have been in some dilemma about this, taking the position that either there was no harm in the letter or, if there was, that it should have been personally secreted from the secretaries. How this should have been done is not clear. This was theletter of transmittal of the tender, containing the conditions of tender and an important part of the records of each office in this connection. In

any event, it has been held that where a person to whom a claim is presented by attorneys in behalf of their client sends to the attorneys a libelous communication concerning the client there is a sufficient publication. Massee v. Williams, (CCA6th, Tenn) 207 F 222; Alabama & V. R. Co. v. Brooks, 69 Miss 168, 13 So 847; Brown v. Elm City Lumber Co, 167 NC 9, 82 SE 561. These charges were also published to the secretary who typed the letter. The court took the position that it was a confidential matter, but under these authorities this would not excuse libelous publication.

Was the letter privileged? In Savage v. Stober, 86 NJL 478, 92 A 284, affd 87 NJL 711, 94 A 1103, defendant attorney wrote a letter to the attorney representing an employer against whom clients of defendant were making a claim. The letter said that the employer was one of the most cold-blooded of men, had provoked assault and battery, and treated his employees like dogs. The court held that this language was manifestly volunteered, was not in response to any inquiry, whether confidential or otherwise, clearly exceeded the demands of the occasion, and was not covered by a privilege. So, that language in the letter from one lawyer to another was deemed published and not privileged. In Tuson v. Evans, 113 Eng. Reprint 991, defendant, in a libel action, had claimed rent from plaintiff, which plaintiff denied owing. Defendant then wrote plaintiff's agent, stating facts in support of his claim but adding "this attempt to defraud me of the produce of the land is as mean as it is dishonest". It was held that although a responsive letter from defendant was proper, to deny the merit of plaintiff's denial, that to characterize that assertion as an attempt to defraud, and as mean and dishonest,

was wholly unnecessary and not justified by the occasion. Instructions to the jury that this publication was necessarily a libel under the law were held to be proper.

In the instant case, the court made reference to the publication being privileged because the matter is involved in this lawsuit. But there was no lawsuit at that time. In all actions for libel the defamatory material becomes involved in a lawsuit, and we acknowledge that defamatory statements made during litigation are privileged.

In this connection, it should be noted that the statements in the letter are imputed to the Zemps and bind them under the rule that a client is liable to a third person injured by an act of the attorney done in the execution of matters within the scope of his authority. 7 C.J.S. Attorney and Client, Sec 68; Gudger v. Manton, 21 Cal 2d 537, 134 P2d 217.

Was there damage as a result? VanFrank did not have evidence of special damage. He did not have witnesses who have told him there are rumors that he is neither competent nor honest enough to be an architect. We know in human affairs that many such imputations never really surface, but often are so created, and persist. For such reasons the law, very properly, recognizes a right to general damages, without specific proof, for some injuries to reputation. And such damages need not be only a dollar. This court said as much very recently in Prince v. Peterson, No. 13765, filed July 22, 1975. The court cited 53 C.J.S. 362, which says:

> If the defamatory charge is actionable per se, the plaintiff is entitled at least to nominal damages, and it is generally held that he is not required to show

actual damage in order to entitle him to substantial damages.

And see also Corbin v. Madison, 12 Wash App 318, 529 P2d 1145; 50 Am Jur 2d 869. The opinion in Prince v. Peterson made reference to the general rule that written or printed words are actionable per se if they are used in a situation or context where they would reasonably be understood to impute dishonesty, or other defamatory connotation, or where they hold the one to whom they refer up to hatred, contempt or ridicule. 50 Am Jur 2d 579.

The defamatory language clearly attacked Roger van Frank, personally, but if it be considered to relate to his professional corporation, the same damage is sustained. A corporation can be the subject of defamation just as can an individual and this particularly would be true of a professional person's incorporation, where the quality and integrity of the professional's services are vital to his personal and corporate good standing in his profession and in the community. 53 C.J.S. Libel and Slander, Sec 146.

3. The statutory penalty imposed upon defendants is against the law.

It is submitted that the same reasons that preclude the award to the Zemps of punitive damages at common law also preclude the award to them of the statutory penalty under U. C. A. 38-1-24, entitled Cancellation of record -- Penalty. As a general rule, penalties are applied reluctantly by the courts, whether the provisions therefor be by contract, statute, or decisional law. In Kopp v. Salt Lake City, 29 U2d 170, 506 P2d 809, this court said:

> The obligation placed upon the City by this judgment could not be other than a penalty created by statute.

> Such penalties are not favored in the law and are applied only when the fact situation clearly justifies invoking the mandate of the statute.

The view of the courts is that the penalty is designed to punish wilful and malicious misconduct, rather than things that although careless or erroneous, do not proceed from such bad intent. The trial court's findings in this connection in this case are well supported by the evidence: There might have been or was some carelessness on the part of Roger van Frank or his employees (that resulted in an excess charge of $76.80, R 38) but there was absolutely no evidence of wilful or malicious conduct on the part of van Frank which would entitle Zemps to punitive damages (R 339, 343). The court concluded, however, that the statutory penalty would apply just the same. Appellants believe this was erroneous.

Research has not disclosed authority directly in point as to the effect of good faith on a mechanic's lien statutory penalty such as ours, but there are cases which show how strictly such a provision is construed against the person claiming such a penalty. For instance, a plaintiff has been held by this court not entitled to this penalty for defendant's failure to release the lien where plaintiff merely had failed to pay or tender the cost incurred and the fees for cancellation. Einerson v. Central Lumber & Hardware Co., 14 U 2d 278, 382 P2d 655. See Sheets v. Prosser, 112 NW 72 (N.D.). Such costs and fees are ordinarily very nominal. In fact, the recording fee for cancellation in Utah is only several dollars (R 309-10).

This court has applied the general rule against penalties as to a mortgage lien on realty, in Shibata v. Bear River State Bank, 115 U 395,

205 P 2d 251. That case interpreted the application of U. C. A. 57-3-8, which provides a double damages penalty for a failure to discharge or release a mortgage after satisfaction. There it was established that defendant bank had acted in good faith, and honestly though erroneously believed that it had valid and subsisting mortgages against plaintiff which had not been satisfied, and refused to release them. The opinion, referring to that statute, states at 205 P2d 254:

> Here, respondent also claims "good faith" and urges that as a defense. Respondent's argument is well taken. The above statute is penal in nature and should be strictly construed. It is not meant to penalize one who honestly, though mistakenly, refuses to release or discharge a mortgage of record because he believes there has been no full satisfaction.

The court thus concluded that good faith refusal to release themortgages was a defense and therefore defendant was not liable for damages under the penalty statute. The opinion cited Mathieu v. Boston, 51 SD 619, 216 NW 361, 56 ALR 332 and notes on pages 345 and 346 of the annotation on the question of "good faith" as a defense under similar statutes. Mathieu held that refusal by a mortgagee to execute a discharge, when acting in good faith and under the honest, but erroneous, belief that the debt has not been paid, does not bring him within the operation of such a statute and does not make him liable for a statutory penalty. There the court quoted Jones on Mortgages, 7th ed vol 2, Sec. 991:

> . . . the mortgagee is not bound upon tender of payment to determine doubtful questions at his peril, and he is not generally held liable to the statutory penalty if his refusal is made in good faith and in the honest belief that he is not bound to accept the tender.

The Mathieu case also cites Schumacher v. Falter, 113 Wis 563, 89 NW 485, in construing Sec 2256 of the Revised Statutes of Wisconsin:

> Although that section does not provide, in terms, that the failure to discharge must be a wilful or malicious one, it is very evident that it was not enacted to punish honest mistakes. A statute in almost the identical language of our section has been construed many times by the Supreme Court of Michigan; and the substance of the decisions in that state is that where there is no intentional wrong in the refusal to discharge, but, rather a reliance in good faith upon some supposed legal right, the penalty will not be imposed, even though the supposed right may be found not to exist. (Emphasis added).

The annotation at 56 ALR 335 of the Mathieu case, cited and relied upon by this court in Shibata, also refers, at pages 343-44, to decisions in which the statutory penalty was denied: for a failure to pay the recording fee, or to pay a release fee, or to pay taxes, or to pay insurance premiums, or to pay interest, or to pay attorney's fees. An Alabama case, Mayhall v. Woodhall, 192 Ala 134, 68 So 322 ruled that if interest on the mortgage debt in the amount of fourteen cents is unpaid, the mortgagee will not be required to pay the statutory penalty. We make these references by analogy, as additional showing of the reluctance of the courts to impose a harsh statutory penalty in a case where punitive or exemplary damages generally would not lie.

At the trial, Roger van Frank acknowledged the error made in his office in regard to the amount of square footage and endeavored in cooperation with counsel to locate the source of the error and to determine the correct amount. The court commended him for this and said following the evidence that there was absolutely no evidence of wilful or malicious conduct on

van Frank's part which would entitle Zemps to punitive or exemplary damages.

CONCLUSION

Appellants feel the record clearly shows that the trial court's findings and conclusions and its decree are not supported by believable evidence in many important particulars.

They respectfully submit that this court, in the exercise of its equitable jurisdiction, should find, conclude and decree that appellants did perform the contract and are entitled to be paid for their services; that it should decree in their favor the amount of $539.53 therefor, together with interest at the legal rate and attorney's fees in a reasonable amount (such as $250, as determined by the trial court for respondents) and their costs. An equitable lien therefor on Zemps' interest in the premises should be declared, in lieu of the mechanic's lien released per the decree of the trial court.

Appellants further request this court to award them an appropriate amount of general damages for the libel, and they waive their claim against respondents for any punitive damages.

In any event, appellants urge that there is no lawful basis to sustain the decree that they pay respondents a statutory penalty of $20 per day for non-cancellation of the mechanic's lien.

Respectfully submitted, this 19th day of September, 1975.

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and Appellants